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State v. Calvillo Appellant's Brief Dckt. 39529

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	NO. 39529
Plaintiff-Respondent,)	
)	TWIN FALLS COUNTY NO. CR 2010-6298
v.)	
)	
VALENTIN CALVILLO,)	APPELLANT'S BRIEF
)	
Defendant-Appellant.)	
_____)	

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FIFTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF TWIN FALLS

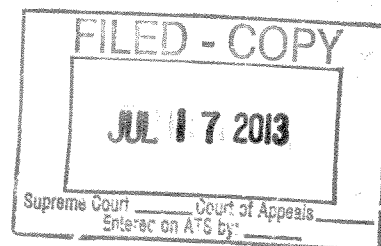
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TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE.....	1
Nature of the Case	1
Statement of the Facts and Course of Proceedings	1
ISSUE PRESENTED ON APPEAL	6
ARGUMENT	7
The Prosecutor Committed Misconduct During Closing Arguments, Rising To The Level Of A Fundamental Error, When The Prosecutor Indirectly Commented On Mr. Calvillo's Right To Remain Silent By Repeatedly Referencing C.V.'s Testimony At Trial As "Unconverted"	7
A. Introduction.....	7
B. Standard of Review	7
C The Prosecutor Committed Misconduct During Closing Arguments, Rising To The Level Of A Fundamental Error, When The Prosecutor Indirectly Commented On Mr. Calvillo's Right To Remain Silent By Repeatedly Referencing C.V.'s Testimony At Trial As "Unconverted" ...	8
CONCLUSION	14
CERTIFICATE OF MAILING	15

TABLE OF AUTHORITIES

Cases

<i>Griffin v. California</i> , 380 U.S. 609 (1965)	8, 9
<i>State v. Gross</i> , 146 Idaho 15 (Ct. App. 2008)	8
<i>State v. Lilly</i> , 142 Idaho 90 (Ct. App. 2005)	14
<i>State v. McMurry</i> , 143 Idaho 312 (Ct. App. 2006)	9, 10, 12
<i>State v. Phillips</i> , 144 Idaho 82 (Ct. App. 2007)	8
<i>State v. Perry</i> , 150 Idaho 209 (2010)	7, 8
<i>State v. Urquhart</i> , 105 Idaho 92 (Ct. App. 1983)	9
<i>State v. Whitaker</i> , 152 Idaho 945 (Ct. App. 2012)	10, 11, 12, 13

STATEMENT OF THE CASE

Nature of the Case

Following a jury trial, conducted partly in his absence, Valentin Calvillo was convicted of seven counts of lewd conduct with a minor and one count of sexual abuse of a minor. He did not testify at his trial, and the only direct evidence against him regarding the alleged acts came from the testimony of the complaining witness, C.V.

During closing arguments, the prosecutor made it the central theme of her argument to highlight that C.V.'s testimony was "uncontroverted" at trial – despite the fact that the only other person who could have controverted this testimony was Mr. Calvillo alone. In fact, the prosecutor repeated the theme of C.V.'s testimony as "uncontroverted" six times during her brief closing argument. In a case hinging entirely on credibility, Mr. Calvillo asserts that this amounted to an impermissible comment on his silence that violated his due process rights and that rose to the level of a fundamental error.

Statement of the Facts and Course of Proceedings

Valentin Calvillo was charged by indictment with eight counts of lewd conduct with a minor, and two counts of sexual abuse of a minor, alleged to have occurred against the same minor between January 1, 2008 and April 20, 2010. (R., pp.11-15; 48-52.) All of these charges involved the same alleged victim, C.V.

At trial, the State presented testimony from C.V.'s sister and mother regarding events leading up to the eventual criminal investigation of Mr. Calvillo. C.V.'s sister,

N.V.¹, first testified that she was living with her mother, C.V., and brother in Mr. Calvillo's home at the time of the conduct alleged by the State. (Tr., p.73, L.6 – p.75, L.16.) During this time, N.V. testified that C.V. made disclosures to her about something that was upsetting C.V. (Tr., p.78, Ls.12-16.) N.V. further testified that C.V. appeared to be upset and was crying when she made these disclosures. (Tr., p.80, L.15 – p.81, L.4.)

Although N.V. did not take any immediate action, she informed her mother the next day of C.V.'s allegations. (Tr., p.82, Ls.13-23.) N.V. also talked with a police officer and a social worker later that day, although the substance of this discussion was never placed into evidence. (Tr., P.83, L.21 – p.84, L.24.)

C.V.'s mother, Herminia Castro, also testified at trial. (Tr., p.128, L.25 – p.133, L.4.) After learning of something that was upsetting C.V., Ms. Castro testified that she took C.V. to a family clinic and subsequently wrote out a police report regarding the allegations. (Tr., p.132, L.25 – p.133, L.20.) She also testified that Mr. Calvillo had attempted to contact her following this report to the police – including one letter in which Mr. Calvillo asked Ms. Castro to forgive him for what he had done to hurt her. (Tr., p.133, L.24 – p.138, L.10.) However, Ms. Castro testified that Mr. Calvillo had made denials regarding the alleged charges and that he had never admitted to any inappropriate conduct with C.V. throughout his contacts with her. (Tr., p.138, Ls.6-10; p.141, Ls.5-19.)

In addition to the testimony of C.V.'s family members, the State also presented testimony from police and social workers involved in the investigation of the case. Jessica Adamson, a licensed social worker with the Idaho Department of Health and

¹ Because C.V.'s sister was not yet 18 years old at the time of her testimony at trial, she is referred to herein by her initials.

Welfare, testified that she spoke with C.V. at C.V.'s home. (Tr., p.86, L.8 – p.98, L.1.) Based on discussions with C.V. and N.V., Ms. Adamson put a "safety plan" into place. (Tr., p.104, Ls.9-11.) Ms. Adamson further testified that a CARES² interview was conducted with C.V. (Tr., p.105, Ls.5-24.)

Officer Javier Pardez was also present when C.V. was initially interviewed at her home. (Tr., p.107, L.16 – p.110, L.20.) Officer Pardez believed that C.V. appeared nervous when talking to him. Based upon her disclosures, Officer Pardez decided to refer the matter to a detective for further investigation. (Tr., p.110, L.21 – p.111, L.14.)

The State also presented the testimony of Patricia Ann Billings, a pediatric nurse practitioner who performed a physical exam of C.V. (Tr., p.159, L.17 – p.177, L.14.) The physical examination of C.V. revealed no abnormalities and C.V.'s hymen was intact, "without any defects, without any bruising, without any discharge." (Tr., p.179, Ls.4-22.) In addition, the State presented the testimony of another forensic interviewer from the CARES program, Lisa Mitton, who testified that delayed disclosure in child sex abuse cases was common. (Tr., p.188, L.22 – p.195, L.22.)

The final witness for the State was C.V. (Tr., p.198, L.24 – p.199, L.3.) C.V. provided the sole testimony as to the substance of the allegations underpinning Mr. Calvillo's charges in this case. (Tr., p.206, L.18 – p.252, L.10.) In each of the instances of conduct alleged by C.V., there was no one else identified who witnessed the conduct she claimed had occurred.

Trial proceedings adjourned for the day following C.V.'s testimony. The next day of trial, Mr. Calvillo was apparently ill and was missing from court. (Tr., p.259, L.19 –

² "CARES" is an acronym for Children At Risk Evaluation Services. (See Tr., p.115, Ls.9-13.)

p.260, L.14.) Defense counsel spoke to Mr. Calvillo briefly at one point that day. According to counsel, Mr. Calvillo appeared very ill, and so counsel told Mr. Calvillo to seek treatment at the emergency room, but then to return to court as soon as possible. (Tr., p.282, L.10 – p.283, L.17.) In the meantime, the trial court entertained argument from the parties regarding Mr. Calvillo's motion to dismiss Count X of the Information alleging sexual abuse of a minor. (Tr., p.260, L.23 – p.285, L.7.) This count was ultimately dismissed by the district court. (Tr., p.284, L.15 – p.285, L.7.)

Mr. Calvillo did not return to court that afternoon, nor for the remainder of his trial. The following morning, the trial court took up the issue of whether to proceed in Mr. Calvillo's absence. (Tr., p.311, L.15 – p.321, L.10.) After finding that Mr. Calvillo's absence was voluntary, noting the actions taken by the court and trial counsel to locate Mr. Calvillo, and further taking note of the difficulties to the State and the trial court should the trial have to be rescheduled, the district court held that trial would continue in Mr. Calvillo's absence. (Tr., p.312, L.14 – p.321, L.10.) The court did, however, instruct the jury that they were not to consider the defendant's presence or absence in any manner during their deliberations. (Tr., p.324, Ls.9-18.)

Mr. Calvillo presented no witnesses on his behalf and made no closing argument. (Tr., p.324, Ls.19-22; Supp. Tr., p.318, Ls.3-5.) In the State's closing argument, the State briefly canvassed the processes involved in the investigation of C.V.'s allegations. However, the majority of the State's closing argument involved the accusations made by C.V. herself. (Supp. Tr., pp.308, L.8 – p.318, L.1.) In the course of relating C.V.'s testimony – which subsumed allegations of activity occurring when there was no one present but Mr. Calvillo and C.V. – the prosecutor repeated six times before the jury that

C.V.'s testimony was "uncontroverted" at trial. (Supp. Tr., p.311, Ls.12-15; p.313, Ls.4-7, Ls.19-22; p.315, Ls.16-17; P.316, Ls.3-6, Ls.20-25.)

Mr. Calvillo was convicted of seven counts of lewd conduct with a minor and of the one remaining count of sexual abuse of a minor. (R., pp.247-249.) The jury could not reach a verdict, however, on Count Three of the State's indictment. (R., p.248.) Approximately five months after the jury's verdict, Mr. Calvillo was located in California and was returned to Idaho for sentencing. (R., pp.254-261.)

Thereafter, Mr. Calvillo filed two separate motions seeking a new trial, as well as a motion seeking reduction of his sentence. (R., pp.300-305; 412-413; 442-444; 494-495.) These motions were denied by the district court. (R., pp.385-402; Order on Rule 34 Motion, Augment; Order on Rule 35 Motion, Augment.)

Mr. Calvillo was sentenced to 30 years, with 15 years fixed, for each of the seven counts of lewd conduct of which he was convicted, and to 15 years fixed for his conviction of sexual abuse of a minor. (R., pp.429-437.) He timely appeals from his judgment of conviction and sentences. (R., p.471.)

ISSUE

Did the prosecutor commit misconduct during closing arguments, rising to the level of a fundamental error, when the prosecutor indirectly commented on Mr. Calvillo's right to remain silent by repeatedly referencing C.V.'s testimony at trial as "uncontroverted"?

ARGUMENT

The Prosecutor Committed Misconduct During Closing Arguments, Rising To The Level Of A Fundamental Error, When The Prosecutor Indirectly Commented On Mr. Calvillo's Right To Remain Silent By Repeatedly Referencing C.V.'S Testimony At Trial As "Uncontroverted"

A. Introduction

Idaho case law has repeatedly recognized that a prosecutor's statements in closing argument that evidence of the charged offense is "uncontroverted" can amount to an unconstitutional comment on the defendant's right to remain silent at trial where the circumstances of the charged offense are such that the defendant is the only other party who could controvert the State's evidence. Such is the case here. All of C.V.'s allegations at trial occurred under circumstances where there was no other party besides Mr. Calvillo who could controvert her allegations.

This was not an isolated reference to Mr. Calvillo's failure to testify. The prosecutor in this case made the fact that C.V.'s testimony was "uncontroverted" a central theme of her closing argument. Given the multiple repetitions of this theme – six times in the course of the closing argument – and the lack of any corroborative evidence of C.V.'s allegations, this misconduct rose to the level of a fundamental error that cannot be said to have been harmless in this case.

B. Standard of Review

Mr. Calvillo acknowledges that there was no contemporaneous objection made at trial to the prosecutor's closing argument. In cases of unobjected to error, this Court employs a three-part test of review for fundamental error. *See, e.g., State v. Perry*, 150 Idaho 209, 226 (2010). Under this test, the defendant must demonstrate: (1) that one or more of the defendant's unwaived constitutional rights were violated; (2) that this error is

obvious from the face of the record; and (3) that the error was not harmless. *Id.* An error is not harmless where there is a reasonable possibility that the error affected the outcome of the proceedings. *Id.*

C. The Prosecutor Committed Misconduct During Closing Arguments, Rising To The Level Of A Fundamental Error, When The Prosecutor Indirectly Commented On Mr. Calvillo's Right To Remain Silent By Repeatedly Referencing C.V.'S Testimony At Trial As "Uncontroverted"

Mr. Calvillo asserts that the prosecutor's repeated and gratuitous references to C.V.'s testimony as "uncontroverted" constitute an impermissible comment on Mr. Calvillo's right to remain silent at trial, and that this misconduct rose to the level of a fundamental error.

Closing argument serves the dual purposes of serving to clarify the issues at stake within a criminal trial, and to help the jury to recall and interpret the evidence in a case. *State v. Phillips*, 144 Idaho 82, 86 (Ct. App. 2007). In order to effectuate these purposes, both sides are generally afforded considerable latitude in making their arguments to the jury from their respective standpoints regarding the evidence. *Id.*

"Considerable latitude, however, has its limits, both in matters express and those implied." *Id.* Among those limits in a criminal case is the prohibition against a prosecutor making a direct or an indirect comment on a defendant's invocation of his or her right to remain silent for purposes of inferring guilt. *Id.* This is true regardless of whether the defendant invoked his or her right to remain silent at trial, or before trial. *Id.*; see also *State v. Gross*, 146 Idaho 15, 18 (Ct. App. 2008).

This prohibition is rooted in the protections afforded by the Fifth Amendment of the United States Constitution against self-incrimination, which specifically prohibits inferring guilt from the defendant's failure to testify at trial. See *Griffin v. California*, 380 U.S. 609, 613-615 (1965). However, such misconduct also violates a defendant's due

process right to a fair trial, “because [evidence of] a defendant’s silence might give rise to an inference of guilt in the mind of the jurors.” *State v. Urquhart*, 105 Idaho 92, 94 (Ct. App. 1983).

In certain instances, a prosecutor’s comment on the state of the evidence as being “uncontroverted” can constitute an impermissible comment on the defendant’s invocation of his right to remain silent at trial. There are two opinions that are instructive for this Court with regard to this issue.

In *State v. McMurry*, the defendant claimed self-defense in a prosecution for aggravated battery, but elected not to testify at trial. *State v. McMurry*, 143 Idaho 312, 313-314 (Ct. App. 2006). During closing argument, the prosecutor made repeated reference to the fact that there was no evidence presented that was contrary to the alleged victim’s version of events and that the defendant had not presented a contrary explanation at trial. *Id.* at 314. After noting that the holding from *Griffin* applied both to direct and indirect comments on the failure to testify, the court proceeded to address whether the prosecutor’s remarks about the evidence being uncontroverted crossed the line into an improper comment on silence.

The *McMurry* court held that it did. In doing so, the Court of Appeals first noted that, “Idaho follows the overwhelming number of jurisdictions holding that a prosecutor’s general references to uncontradicted evidence do not necessarily reflect on the defendant’s failure to testify, where *witnesses other than the defendant* could have contradicted the evidence.” *Id.* at 314 (emphasis in the original). However, the court in *McMurry* also recognized that such remarks can give rise to a *Griffin* violation, “depending on the number and nature of the comments.” *Id.* at 314-315.

In finding misconduct, the Court of Appeals clarified that:

Comment on the absence of evidence contradicting the state's case is particularly problematic where the defendant is the *sole witness* who would be able to contradict the evidence in question. While we have not previously addressed this situation in Idaho, courts generally hold that such comment in this context is improper.

McMurry, 143 Idaho at 315 (emphasis in the original).

In addition, the *McMurry* court found that the number of references to the uncontroverted nature of the evidence is germane to the analysis of whether such argument constitutes an indirect comment on silence. The court held that, “[e]ach time a prosecutor comments on the absence of contradicting evidence, it ‘further increase[s] the likelihood that the jury would draw an improper reference.’” *Id.* at 316 (quoting *Raper v. Mintzes*, 706 F.2d 161, 167 (6th Cir. 1983)).

Following *McMurry*, the Court of Appeals revisited the issue of a prosecutor’s repeated references to uncontroverted evidence as an indirect comment on silence in *State v. Whitaker*, 152 Idaho 945, 950-952 (Ct. App. 2012). The defendant in *Whitaker* was charged with 13 counts of lewd conduct and four counts of sexual abuse of a minor allegedly involving two different minor victims. *Whitaker*, 152 Idaho at 947. While both of the alleged victims testified at trial, the defendant did not. *Id.* at 947, 950.

Just as in this case, the prosecutor in *Whitaker* made six separate references in closing argument to the fact that the alleged victims’ version of events was uncontroverted at trial. *Id.* at 950-951. In reviewing this claim for fundamental error, the Court of Appeals in *Whitaker* first determined that the defendant’s Fifth and Fourteenth Amendment rights against self-incrimination were implicated by the prosecutor’s argument. In particular, the *Whitaker* court noted that, “[i]n this case, the prosecutor asked the jury to consider that the victims’ testimony was ‘uncontroverted’ concerning

events that occurred when only Whitaker and one of the girls were present. Thus, the prosecutor's comments implicated Whitaker's Fifth Amendment privilege." *Id.* at 951.

The Court of Appeals likewise found that this error was plain from the face of the record, in large measure due to the volume of comments by the prosecutor regarding the state of the evidence as "uncontroverted":

The number of the prosecutor's allusions to the absence of testimony from the defendant is significant in ascertaining whether there has been a *Griffin* violation. As the Sixth Circuit has said in *Raper v. Mintzes*, "We do not suggest that any magic number will constitute a violation of *Griffin* but the number of comments, along with their nature, is a key factor." In *McMurry*, we found a *Griffin* violation where the prosecutor made at least four indirect comments upon the defendant's failure to testify or provide an explanation to police who investigated the charged offense. In Whitaker's trial, the prosecutor's rebuttal closing argument used the term "uncontroverted" or a similar phrase six times when referring to testimony that only Whitaker could have contradicted.

Id. (internal citations omitted).

The error in this case with regard to the first two prongs of the *Perry* fundamental error test is fundamentally indistinguishable from that in *Whitaker*. As in *Whitaker*, the allegations of sexual misconduct levied by C.V. against Mr. Calvillo were of a nature that there was only one person who could contradict these claims - Mr. Calvillo. Accordingly, statements regarding this evidence being uncontradicted implicated Mr. Calvillo's Fifth and Fourteenth Amendment rights, as he was the only person in a position to controvert C.V.'s allegations.

The State likewise did not make a general reference to the overall state of the evidence as being uncontroverted. Rather, the State parsed out each of C.V.'s allegations of sexual misconduct into separate incidents, and then returned time and time again to emphasize that her version of events was uncontested:

And what you heard from [C.V.] was uncontroverted evidence that proves every one of these counts beyond a reasonable doubt.

(Supp. Tr., p.311, Ls.12-15)

You've heard uncontroverted evidence from [C.V.] what this defendant did, and what he did was sexual abuse of a child.

(Supp. Tr., p.313, Ls.4-7.)

That's the uncontroverted evidence of what that defendant did to her in the front seat of the car at that park, and that's for Count X, Instruction 28.

(Supp. Tr., p.313, Ls.19-22.)

That uncontroverted evidence proves this case beyond a reasonable doubt.

(Supp. Tr., p.315, Ls.16-17.)

... if you can recall that testimony, which has been uncontroverted, which proves the defendant committed this crime.

(Supp. Tr., p.316, Ls.3-6.)

That uncontroverted evidence, which is entirely believable, after you watched her testify and say what she said during this trial, that proves this case, that count, beyond a reasonable doubt.

(Supp. Tr., p.316, Ls.20-25.)

Beyond demonstrating an intent to emphasize Mr. Calvillo's exercise of his right not to testify at trial, the number of these improper remarks are also significant to the prejudicial effect of this misconduct in this case. As was noted by the Court of Appeals in *McMurry*, each time a prosecutor comments on the absence of contradicting evidence increases the likelihood that the jury would draw an improper inference of the defendant's guilt from his failure to testify. *McMurry*, 143 Idaho at 316.

Moreover, this Court also looks to the overall strength of the properly admitted evidence in considering whether the misconduct was harmless. The decision in *Whitaker* is likewise useful for this Court with regard to the issue of harmlessness, given

the **absence** in this case of each of the evidentiary factors that led to the *Whitaker* court deeming the prosecutorial misconduct to be harmless. In *Whitaker*, there were two different victims, each of whom lent partial corroboration to the allegations of the other. *Whitaker*, 152 Idaho at 952-953. One of the alleged victims in *Whitaker* actually observed the defendant in potentially compromising circumstances with the other alleged victim and further observed the defendant trying to shield her view of what was happening at that time. *Id.* In this case, in contrast, there was no one else at all who corroborated the substance of C.V.'s allegations – it was solely her testimony that provided any substantive evidence of the charged offenses.

Further, there was medical evidence in *Whitaker* that tended to corroborate the criminal allegations. A medical examination of one of the victims revealed a vaginal scar that could only have been caused by sexual intercourse. *Id.* at 953. Moreover, both victims tested positive for a vaginal bacteria which is more commonly found in sexually active teenagers. *Id.* Here there was no such evidence. The medical examination of C.V. and laboratory tests revealed no abnormalities and C.V.'s hymen was intact, "without any defects, without any bruising, without any discharge." (Tr., p.179, Ls.4-22.)

Thus, the entirety of the State's case rested on the shoulders of C.V.'s testimony alone to establish the charged acts. Through repeatedly exhorting the jury regarding the "uncontested" nature of this testimony, the prosecutor was implicitly conveying that Mr. Calvillo had some evidentiary burden to contest this testimony, and that his failure to do so through testifying was somehow evidence showing his guilt. Finally, the fact that the jury was unable to reach a verdict about one of the counts in this case shows that the jury harbored at least some measure of doubt regarding C.V.'s allegations of

criminal wrongdoing. (Tr., p.333, Ls.1-7.) See *State v. Lilly*, 142 Idaho 70, 74 (Ct. App. 2005) (citing the jury's rejection of one of the charged offenses as evidence tending to show that the trial error was not harmless). Under the facts of this case, there is a reasonable possibility that the prosecutorial misconduct in this case contributed to the jury's verdict. Accordingly, Mr. Calvillo asks that this Court reverse his judgment of conviction and sentences, and remand this case for further proceedings.

CONCLUSION

Mr. Calvillo respectfully requests that this Court reverse his judgment of conviction and sentence, and remand his case for further proceedings.

DATED this 17th day of July, 2013.

A handwritten signature in dark ink, appearing to read 'S. E. Tompkins', written over a horizontal line.

SARAH E. TOMPKINS
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING


I HEREBY CERTIFY that on this 17th day of July, 2013, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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